Bank Pembangunan Malaysia Bhd v Abdul Razak Sheikh Mahmood & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–676 OF 1997

NIK HASHIM, AUGUSTINE PAUL JJCA AND ZAINUN ALI J

22 NOVEMBER 2003

Civil Procedure — Summary judgment — Delay in application for summary judgment — Delay of five years and three months — Burden on the appellant — Whether sufficient that delay inordinate and inexcusable in absence of any explanation — Whether respondents must still show evidence of prejudice suffered — Absence of objection to delay by respondents — Effect

Civil Procedure — Summary judgment — Delay in application for summary judgment — Whether delay intentional and contumelious or inordinate and inexcusable — Whether delay per se made conduct intentional and contumelious or an abuse of court process — Absence of explanation for delay

Civil Procedure — Summary judgment — Delay in application for summary judgment — Proceedings under O 14 — Whether rule on summons for directions suspended — Delay in taking out summons — When time period begins to run — Rules of the High Court 1980 O 25 r 2(a)

The appellant, a bank incorporated in Malaysia, had granted a loan facility to Altanmiah Amwal Sdn Bhd ('the borrower') pursuant to the terms of a charge dated 18 July 1983 in respect of which the first, second and third respondents were guarantors. The borrower failed to pay the appellant the sum of RM611,634.58 which had become due. The appellant then commenced proceedings ('the action') on 13 October 1986 against the three respondents for the recovery of the said sum. The respondents filed their defence on 18 March 1987. A summons for directions was filed by the appellant on 6 May 1996 ('the first summons'). It was adjourned on several occasions as the parties disputed as to whether the action had been settled pursuant to a settlement agreement that had been entered into by them. Even after they were given time by the learned senior assistant registrar to verify the terms of the settlement agreement, on that day the appellant could not confirm the terms of the settlement agreement and the first summons was further adjourned to 25 September 1996. After several adjournments, it was fixed for hearing on 27 October 1997. While it was pending, the first and second respondents filed an application on 21 August 1997 to dismiss the appellant's claim for want of prosecution pursuant to O 25 r 4 of the Rules of the High Court 1980 ('the RHC'). The affidavit deposed that the appellant had commenced several proceedings against the respondents as guarantors and that they were all settled pursuant to a settlement agreement dated 20 November 1991. It was alleged that the filing of the second summons was an abuse of the process of court and that the delay by the appellant in prosecuting the claim had prejudiced them. The appellant deposed that the settlement agreement was in respect of another claim, namely, Civil Suit No C4–23–2981 of 1986 against the respondents which

was discontinued after the settlement. The appellant said that the delay prior to 1991 could not be considered as there was an application for summary judgment which was disposed of only on 10 January 1991. The application by the respondents was allowed by the High Court. This appeal was by the appellant against the order.

Held, allowing the appeal:

(1) An order dismissing an action for want of prosecution is a draconian one, and will not be lightly made. The principles that guide the court in the exercise of this jurisdiction could be summarized in brief to the two heads: (i) where the default had been intentional and contumelious; and (ii) where there was such an inordinate and inexcusable delay that the defendant had been prejudiced by it (see paras 6–8).

(2) A proceeding which is litigated under O 14 of the RHC cannot at the same time be prepared for trial. Thus, O 25 r 2(a) of the RHC provides that the rule does not apply to actions in which the defendant or the plaintiff has applied for judgment under O 14. Where an application for summary judgment is dismissed the period for applying for a summons for directions would run one month from the date of such dismissal. The delay in this case would therefore be one month from 10 January 1991 after the O 14 application came to an end on 6 May 1996 when the first summons was filed. That amounted to a delay of five years and three months. The learned trial judge had therefore misdirected himself on the period of delay (see para 12); *Hongkong Bank (M) Bhd v Tan Tock Sing & Ors* [1998] 6 MLJ 89 followed.

(3) A determination as to whether the delay was intentional and contumelious or inordinate and inexcusable was significant. If it was the latter, the burden was on the defendant to establish that he had suffered or would suffer prejudice as a result of the delay. If it was the former, there was no burden on the defendant to establish prejudice; but he must show that the delay was intentional and contumelious. There could be no dispute that the appellant did not take any steps in the action from 1991 to 1996. No reasons were also advanced to explain the inaction during that period. It is settled law that delay per se does not make the conduct intentional and contumelious or an abuse of the process of the court. The absence of an explanation for the delay per se also did not give rise to an inference of intentional and contumelious conduct (see paras 13–14).

(4) The delay under the second rule must be so inordinate and inexcusable that the respondents had been prejudiced by it. The period of five years and three months during which no action was taken by the appellant in the action clearly connoted delay which was out of the ordinary. The burden was on the appellant to explain the reasons for the delay. The appellant had not done so with regard to the period prior to the issue of the first summons. In the absence of any explanation, it must be taken that the delay was inordinate and

inexcusable. However, that alone is not sufficient. There must be evidence of prejudice suffered by the respondents. The burden was on the respondents to establish the prejudice. A bald statement without any particularization of the nature and extent of the prejudice suffered was not sufficient to discharge the burden (see paras 16–17).

(5) If the respondents genuinely believed that the settlement agreement had terminated all proceedings against them, they ought to have filed an application to dismiss the action on that ground. Instead, they attended the hearing of the summons for directions from time to time and the only objection raised was that the action had been settled without any reference to the delay that had been caused. The absence of objection to the delay by the respondents transcended the boundaries of them passively waiting for the appellant to take the next step in the proceeding. This could only mean that they were not affected by the delay. Considerable weight should be attached to the conduct of the respondents on the facts of this case in assessing the significance of the delay (see para 18).

(6) The stage at which a defendant may file an application to strike out an action for want of prosecution is when the plaintiff has failed to take out a summons for directions within the specified period (O 25 r 4 of the RHC). The rule must not and cannot be interpreted to mean that a plaintiff loses the right to apply for a summons for directions after the expiry of the stipulated one-month period from the close of pleadings. The respondents filed the application to strike out the action for want of prosecution after the appellant had filed the second summons. At that point of time, there was subsisting a valid summons for directions. The course adopted by the respondents in such circumstance was therefore irregular (see paras 21–22).

[**Bahasa Malaysia summary**

Perayu, sebuah bank yang ditubuhkan di Malaysia, telah memberikan kemudahan pinjaman kepada Altanmiah Amwal Sdn Bhd ('peminjam') menurut terma-terma suatu gadaian bertarikh 18 Julai 1983 yang mana responden-responden pertama, kedua dan ketiga adalah penjamin-penjaminnya.Peminjam gagal membayar perayu sejumlah RM611,634.58. Perayu kemudian telah memulakan prosiding ('tindakan tersebut') melalui writ bertarikh 13 Oktober 1986 terhadap ketiga-tiga responden tersebut untuk mendapat balik jumlah tersebut. Responden-responden tersebut telah memfailkan pembelaan mereka pada 18 Mac 1987. Pada 6 Mei 1996, perayu telah memfailkan saman untuk arahan (saman pertama) tetapi ia telah ditangguhkan untuk beberapa kali kerana pihak-pihak telah mempertikaikan sama ada tindakan tersebut telah diselesaikan menurut perjanjian penyelesaian yang dimasuki antara mereka. Walaupun mereka diberikan masa oleh penolong kanan pendaftar untuk mengesahkan terma-terma perjanjian penyelesaian berkenaan, pada hari tersebut perayu tidak dapat mengesahkan terma-terma perjanjian penyelesaian tersebut dan saman pertama tersebut telah ditangguhkan lagi kepada 25 September

1996. Selepas beberapa penangguhan, ia telah ditetapkan pada 27 Oktober 1997. Sementara menggu ia selesai, responden-responden pertama dan kedua telah memfailkan satu permohonan pada 21 Ogos 1997 untuk menolak tuntutan perayu yang inginkan pendakwaan menurut A 25 k 4 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Afidavit yang mendeposkan bahawa perayu telah memulakan beberapa prosiding terhadap responden-responden sebagai penjamin-penjamin dan bahawa semuanya telah diselesaikan menurut perjanjian penyelesaian bertarikh 20 November 1991. Ia dikatakan bahawa pemfailan saman kedua adalah satu penyalahgunaan proses mahkamah dan bahawa kelewatan oleh perayu dalam mendakwa tuntutan tersebut telah memprejudiskan mereka. Perayu telah mendeposkan bahawa perjanjian penyelesaian tersebut adalah berkaitan tuntutan lain, iaitu, Guaman Sivil No C4–23–2981 tahun 1986 terhadap responden-responden yang telah diberhentikan selepas penyelesaian tersebut. Perayu menyatakan bahawa kelewatan sebelum 1991 tidak boleh diambilkira kerana terdapat satu permohonan untuk penghakiman terus yang hanya dideposkan pada 10 Januari 1991. Permohonan oleh responden-responden telah dibenarkan oleh Mahkamah Tinggi. Rayuan ini adalah oleh perayu terhadap perintah tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Satu perintah menolak suatu tindakan kerana inginkan pendakwaan adalah suatu yang tegas, dan tidak boleh dibuat sewenang-wenangnya. Prinsip-prinsip yang membantu mahkamah menggunakan bidang kuasa ini boleh disimpulkan secara ringkas di bawah dua tajuk: (i) di mana kegagalan adalah secara sengaja dan menghina mahkamah; dan (ii) di mana terdapat kelewatan yang melampau dan tidak boleh diamaafkan yang telah memprejudiskan defendan (lihat perenggan-perenggan 6–8).

(2) Satu prosiding yang dilitigasikan di bawah A 14 KMT tidak boleh pada masa yang sama disediakan untuk perbicaraan. Oleh itu, A 25 k 2(a) KMT memperuntukkan bahawa kaedah tersebut tidak terpakai untuk tindakan-tindakan di mana defendan atau plaintif telah memohon untuk penghakiman di bawah A 14. Di mana satu permohonan untuk penghakiman terus ditolak, tempoh memohon saman untuk arahan bermula satu bulan daripada tarikh penolakan. Kelewatan dalam kes ini, oleh itu, adalah satu bulan daripada 10 Januari 1991 selepas permohonan A 14 berakhir kepada 6 Mei 1996 apabila saman pertama difailkan. Ia merupakan kelewatan lima tahun dan tiga bulan. Hakim bicara yang bijaksana telah salah arah berhubung tempoh kelewatan (lihat perenggan 12); *Hongkong Bank (M) Bhd v Tan Tock Sing & Ors* [1998] 6 MLJ 89 diikut.

(3) Satu penentuan sama ada kelewatan tersebut adalah secara sengaja dan menghina mahkamah atau melampau dan tidak boleh dimaafkan adalah penting. Sekiranya ianya yang terkemudian , beban terletak atas defendan untuk membuktikan bahawa beliau mengalami atau akan diprejudiskan akibat daripada kelewatan tersebut. Sekiranya ia adalah yang terdahulu, tiada beban atas defendan untuk membuktikan

prejudis; tetapi beliau hendaklah menunjukkan bahawa kelewatan tersebut disengajakan dan menghina mahkamah. Tidak dipertikaikan bahawa perayu tidak mengambil apa-apa tindakan dari 1991 hingga 1996. Tiada sebab juga dikemukakan untuk menjelaskan mengapa tindakan tidak diambil dalam tempoh tersebut. Adalah undang-undang tetap bahawa kelewatan per se tidak menjadikan perbuatan tersebut adalah secara sengaja dan menghina mahkamah atau satu penyalahgunaan proses mahkamah. Ketiadaan penjelasan untuk kelewatan per se juga tidak menimbulkan apa-apa inferen satu perbuatan yang disengajakan dan menghina mahkamah (lihat perenggan-perenggan 13–14).

(4) Kelewatan di bawah kaedah kedua seharusnya melampau dan tidak boleh dimaafkan sehinggakan responden-responden telah diprejudiskan olehnya. Tempoh lima tahun tiga bulan di mana tiada tindakan telah diambil oleh perayu dalam tindakan tersebut dengan jelas membawa konotasi kelewatan yang luar biasa. Beban adalah terletak atas perayu untuk menjelaskan sebab-sebab kelewatan tersebut. Perayu tidak berbuat begitu berhubung tempoh sebelum pengeluaran saman pertama. Maka, ini harus dianggap sebagai kelewatan yang melampau dan tidak boleh dimaafkan. Bagaimanapun, itu sahaja tidak mencukupi. Perlu ada bukti bahawa prejudis dialami oleh responden-responden. Beban terletak pada responden-responden untuk membuktikan prejudis tersebut. Satu kenyataan kosong tanpa apa-apa sifat terperinci dan tahap prejudis yang dialami tidak mencukupi untuk melepaskan beban tersebut (lihat perenggan-perenggan 16–17).

(5) Sekiranya responden-responden dengan ikhlas mempercayai bahawa perjanjian penyelesaian telah menamatkan semua prosiding terhadap mereka, mereka sepatutnya memfailkan permohonan untuk menolak tindakan berkenaan atas alasan tersebut. Sebaliknya, mereka telah menghadiri perbicaraan saman untuk arahan tersebut dari masa ke semasa dan satu-satunya bantahan yang ditimbulkan adalah bahawa tindakan tersebut telah diselesaikan tanpa apa-apa rujukan kepada kelewatan yang berlaku. Ketiadaan bantahan berhubung kelewatan tersebut oleh responden-responden mengatasi sempadan mereka yang secara pasif menanti perayu mengambil langkah berikutnya dalam prosiding. Ini hanya boleh bermakna bahawa mereka tidak terjejas oleh kelewatan tersebut. Pertimbangan yang munasabah patut diberikan berhubung perbuatan responden-responden berdasarkan fakta-fakta kes ini dalam menilai kepentingan kelewatan tersebut (lihat perenggan 18).

(6) Peringkat di mana seorang defendan boleh memfailkan satu permohonan untuk membatalkan satu tindakan kerana inginkan pendakwaan adalah apabila plaintif telah gagal untuk mengeluarkan satu saman untuk arahan sebagaimana dalam tempoh yang ditetapkan (A 25 k 4 KMT). Kaedah tersebut seharusnya dan tidak boleh ditafsirkan untuk bermaksud bahawa seorang plaintif akan kehilangan hak memohon saman untuk arahan selepas tamat tempoh satu bulan

yang ditetapkan daripada penutup pliding tersebut. Responden-responden telah memfailkan permohonan untuk mengenepikan tindakan tersebut kerana inginkan pendakwaan selepas perayu memfailkan saman kedua. Pada masa tersebut, telah wujud satu saman untuk arahan yang sah. Aliran yang digunakan oleh responden-responden dalam keadaan sedemikian oleh itu adalah di luar aturan (lihat perenggan-perenggan 21–22).]

Notes

For cases on delay in application for summary judgment, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5907–5923.

For summary judgement, see 1 *Halsbury's Laws of Malaysia* (2002 Reissue) paras [10.6–048] — [10.6–057].

Cases referred to

Allen v Sir Alfred McAlpine & Sons Ltd [1968] 2 QB 229 (refd)

Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors [1997] 5 MLJ 685 (refd)

Arbuthnot Latham Bank v Trafalgar Holdings [1998] 2 All ER 181 (refd)

Austin Securities Ltd v Northgate and English Stores Ltd [1969] 2 All ER 753 (refd)

Banco Popolare di Novara v John Livanos & Sons Ltd [1973] 117 SJ 509 (refd)

Birkett v James [1978] AC 297 (refd)

Costellow v Somerset County Council [1993] 1 All ER 952 (refd)

Datuk Samy Vellu v Karpal Singh [1989] 3 MLJ 493 (refd)

Department of Transport v Chris Smaller (Transport) [1989] 1 All ER 897 (refd)

Eagil Trust v Pigott-Brown [1985] 3 All ER 119 (refd)

Grovit v Doctor [1997] 2 All ER 417 (refd)

Hongkong Bank (M) Bhd v Tan Tock Sing & Ors [1998] 6 MLJ 89 (folld)

Jeyaretnam Joshua Benjamin v Lee Kuan Yew [2001] 4 SLR 1 (refd)

Lee Boon Tin v Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor [1996] 5 MLJ 601 (refd)

Lee Mun Tuck v Tan Chin Kah & Anor [1991] 2 MLJ 324 (refd)

Ling Kee Ling v Leow Leng Siong [1992] 2 SLR 725 (refd)

Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia (sued as a firm) & Ors [1995] 2 MLJ 185 (refd)

QCD (M) (in liquidation) v Wah Nam Plastic Industry [1999] 2 SLR 381 (refd)

TM Feroze Khan & Ors v Meera Hussain bte TM Mohamed Mydin [2000] 1 MLJ 321 (refd)

Toh Hock Thye & Ors v Toh Chwee Biow [1982] 1 MLJ 152 (refd)

United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors [1994] 3 MLJ 73 (refd)

Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150 (refd)

Wee Siew Noi v Lee Mun Tuck (administrator of the estate of Lee Wai Leng, decd) [1993] 2 SLR 232 (refd)

Wong Sin Meng v Wong Sam Moi & Anor [1991] 2 MLJ 277 (refd)

Legislation referred to

Rules of the High Court 1980 O 3 r 5, O 14, O 18 r 19, O 25 rr 1, 2(a), 4

Appeal from: Civil Suit No C4–23–3382 of 1986 (High Court, Kuala Lumpur)

Wan Mohamed Zam bin Wan Embong (Prasad Abraham & Assoc) for the appellant.
K Anantham (Skrine) for the respondent.

Augustine Paul JCA (delivering judgment of the court):

[1] In this case, the plaintiff (the appellant before us), a bank incorporated in Malaysia, had granted a loan facility to Altanmiah Amwal Sdn Bhd ('the borrower') pursuant to the terms of a charge dated 18 July 1983 in respect of which the first, second and third defendants were guarantors. The borrower failed to pay the appellant the sum of RM611,634.58 which had become due. The appellant then commenced proceedings ('the action') by its writ dated 13 October 1986 against the three defendants for the recovery of the said sum. The defendants filed their defence on 18 March 1987. A summons for directions was filed by the appellant on 6 May 1996 ('the first summons'). It was adjourned on several occasions as the parties were in dispute as to whether the action had been settled pursuant to a settlement agreement that had been entered into by them. They were given time by the learned senior assistant registrar ('SAR') to verify the terms of the settlement agreement and it was then fixed for hearing on 21 August 1996. Even on that day, the appellant could not confirm the terms of the settlement agreement and the first summons was further adjourned to 25 September 1996. The appellant was compelled to withdraw it on 18 November 1996 as it still could not verify whether the settlement agreement included the action. On 21 November 1996, the appellant filed another summons for directions ('the second summons'). This too could not proceed as the parties were still not able to confirm whether the action had been resolved. After several adjournments, it was fixed for hearing on 27 October 1997. While it was pending, the first and second defendants (the respondents before us) filed an application on 21 August 1997 to dismiss the appellant's claim for want of prosecution pursuant to O 25 r 4 of the Rules of the High Court 1980 ('the RHC'). It was supported by an affidavit affirmed by the first respondent explaining their objection to the two summonses. It was deposed that the appellant had commenced several proceedings against the respondents as guarantors and that they were all settled pursuant to a settlement agreement dated 20 November 1991. It was alleged that the filing of the second summons is an abuse of the process of court and that the delay by the appellant in prosecuting the claim had prejudiced them. In its affidavit in reply the appellant deposed that the settlement agreement was in respect of another claim, namely, Civil Suit No C4–23–2981 of 1986 against the respondents which was discontinued after the settlement. The appellant then explained the progress of the two summonses in paras 9, 10 and 11 of its affidavit which read as follows:

Paragraph 9

Perenggan 9, 10, 11, 15 dan 16 adalah dinafikan. Selanjutnya, saya menyatakan Saman Minta Arahan bertarikh 21.11.96 tidak pernah diperbicarakan dan saya telah dimaklumkan Cik Norhaslinda yang telah menghadiri Mahkamah bagi pihak Plaintif pada 18.11.96 dan sesungguhnya percaya bahawa ianya telah dibatalkan dengan kebebasan memfailkan semula kerana pada tarikh pendengaran yang ditetapkan pada 18.11.96, selepas beberapa penangguhan bermula daripada 6.8.96 ke 13.8.96 ke 21.8.96 ke 25.9.96 dan akhirnya ke 18.11.96, peguamcara-peguamcara Defendan-Defendan tidak hadir dan ekoran daripada itu, Mahkamah tidak dapat meneruskan dengan pendengaran Saman Minta Arahan tersebut, walaupun, pihak Plaintif ingin meneruskannya.

Paragraph 10

Penangguhan-penangguhan tersebut adalah disebabkan oleh peguamcara-peguamcara Defendan-Defendan sendiri di mana kami telah dengan nyata di dalam surat-surat kami bertarikh 18.10.96 dan 17.12.96 memaklumkan kepada peguamcara-peguamcara Defendan-Defendan bahawa kami akan meneruskan dengan pendengaran Notis Minta Arahan tersebut.

Dilampirkan bersama di sini surat-surat tersebut yang ditanda sebagai eksibit 'FH-3' secara kolektif.

Paragraph 11

Perenggan 18 Afidavit tersebut adalah dinafikan di mana adalah jelas bahawa kami telah memohon perbicaraan diteruskan, tetapi di atas bantahan peguamcara-peguamcara Defendan-Defendan, Mahkamah ini telah mengarahkan peguamcara-peguamcara Defendan-Defendan untuk memfailkan satu permohonan untuk Mahkamah memutuskan samada perjanjian penyelesaian tersebut meliputi tindakan ini. Malangnya, sehingga kini, selepas pendengaran Saman Minta Arahan ditangguhkan begitu banyak kali, bermula dari 14.1.97 ke 20.3.97 ke 13.5.97 ke 5.6.97 dan kini ditetapkan pada 27.10.97, Defendan Pertama dan Ketiga masih gagal membuat demikian.

[2] It was also deposed by the appellant that the application by the respondents is defective as at all material times a summons for directions had been filed.

[3] The application by the respondents was allowed by the High Court on 15 October 1997 and the appellant's claim was dismissed with costs. This appeal is by the appellant against the order. In his grounds of judgment dated 24 September 2002, the learned trial judge says as follows:

Defendan Pertama dan Kedua adalah penjamin kepada pinjaman yang telah diberikan kepada sebuah syarikat.

Pembelaan telah difailkan oleh Defendan-Defendan pada 18.3.1987 dan Saman Minta Arahan telah difailkan pada 21.11.96. Selepas daripada itu tiada sebarang tindakan telah diambil oleh pihak Plaintif.

Kelewatan mengambil langkah-langkah perlu untuk meneruskan tindakan setelah pliding ditutup di dalam kes iaitu setelah pembelaan difailkan dengan SMA difailkan adalah (9) tahun dan tiada sebarang sebab telah diberikan oleh Plaintif kenapa kelewatan tersebut telah berlaku.

Permohonan ini dibuat setelah Plaintif didapati cuba untuk mendapatkan tarikh perbicaraan sedangkan Saman Minta Arahan sepatutnya difailkan dalam tempoh (1) bulan setelah pliding ditutup. Dalam kes ini SMA telah difailkan (9) tahun setelah pliding ditutup dan Plaintif langsung tidak mengambil tindakan untuk meneruskan tindakan ini selepas itu. Oleh itu adalah jelas Plaintif gagal mematuhi Aturan 25 Kaedah 1(1) KKMT 1980. Mahkamah juga berpendapat kelewatan di sini adalah satu kelewatan yang melampau yang tidak boleh dimaafan.

Terdapat satu perjanjian penyelesaian di dalam kes ini yang telah dimasuki oleh pihak-pihak. Mahkamah berpendapat tindakan Plaintif untuk meneruskan tindakan ini setelah (6) tahun selepas penyelesaian dimasuki adalah amat memprejudiskan kepada Defendan-Defendan.

Defendan-Defendan kini menghadapi kesukaran untuk mendapatkan keadilan kerana sebelum ini Defendan berpendapat penyelesaian tersebut telah menamatkan sebarang tindakan Plaintif terhadap mereka.

Atas alasan dinyatakan di atas, Mahkamah berpendapat keputusan untuk membenarkan permohonan Defendan Pertama dan Kedua untuk membatalkan tindakan ini atas alasan ketiadaan pendakwaan adalah wajar. Kelewatan (9) tahun yang dikatakan adalah jelas merupakan satu kelewatan yang melampau dan tidak dapat dimaafkan.

[4] At the hearing before us, it was contended by the appellant that the delay in proceeding with the action is not inexcusable. At the time of the filing of the respondents' application, the appellant had already taken steps to proceed with it. Reference was made to the course taken by the two summonses that had been filed by the appellant. The respondents had objected to the hearing of the second summons on the ground that the action had been settled and, accordingly, it was adjourned on five occasions. Learned counsel said that by letter dated 3 December 1996 the respondents were informed that the appellant intended to proceed with the matter and that they could file a proper application to court if they were of the view that the action formed part of the settlement agreement. By letter dated 14 January 1997, the appellant informed the respondents of the date that had been fixed for the hearing of the second summons. Learned counsel for the appellant added that the proper procedure to have been adopted by the respondents ought to have been to apply for the action to be dismissed under O 18 r 19 of the RHC on the ground that it had been settled instead of the application that had been filed. It was then submitted that the settlement agreement did not encompass this action. It was finally argued that it must be shown that the delay in proceeding with the action has caused prejudice to the respondents who bear the burden of establishing this issue. They had merely stated that they had been prejudiced without condescending to particulars as contemplated by *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73. In his reply, learned counsel for the respondents said that a summons for directions must be taken out within one month after close of pleadings as provided by O 25 r 1 of the RHC and that the respondents are entitled to file an application to dismiss the action at any time after the breach by the appellant. Learned counsel then said that the appellant is guilty of gross and

inordinate delay in filing the second summons nine years after the defence had been filed which must necessarily be prejudicial. He added that gross disregard of the rules of procedure amounts to an abuse of process and that in such cases there is no necessity to prove prejudice. In his reply, learned counsel for the appellant said that the delay prior to 1991 cannot be considered as there was an application for summary judgment which was disposed of only on 10 January 1991.

THE LAW

[5] An order dismissing an action for want of prosecution is a draconian one, and will not be lightly made (see *Wee Siew Noi v Lee Mun Tuck (administrator of the estate of Lee Wai Leng, decd)* [1993] 2 SLR 232). The principles that guide the court in the exercise of this jurisdiction were summarized in *Birkett v James* [1978] AC 297 where Lord Diplock in approving *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 said at p 318:

> The power should be exercised only where the court is satisfied either: (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

[6] This view of the law has found favour in a plethora of local cases. See, for example, *TM Feroze Khan & Ors v Meera Hussain bte TM Mohamed Mydin* [2000] 1 MLJ 321; *Arab-Malaysia Finance Bhd v Malacca Development Corp Sdn Bhd & Ors* [1997] 5 MLJ 685; *Lee Boon Tin v Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Anor* [1996] 5 MLJ 601; *Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia (sued as a firm) & Ors* [1995] 2 MLJ 185; *Wong Sin Meng v Wong Sam Moi & Anor* [1991] 2 MLJ 277; *Datuk Samy Vellu v Karpal Singh* [1989] 3 MLJ 493; *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150 and *Toh Hock Thye & Ors v Toh Chwee Biow* [1982] 1 MLJ 152. We will now refer in brief to the two heads under which an action may be dismissed for want of prosecution.

(a) Where the default has been intentional and contumelious

[7] In *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [2001] 4 SLR 1 LP Thean JA referred to cases such as *Grovit v Doctor* [1997] 2 All ER 417 and *Arbuthnot Latham Bank v Trafalgar Holdings* [1998] 2 All ER 181 to hold that where there is an abuse of process of the court under this head it is not necessary to establish that prejudice has been sustained by the defendant or that a fair trial is no longer possible. It is therefore sufficient to establish that the delay has been intentional and contumelious. It must, however, be observed that delay per se is not an abuse of process (see *QCD (M) (in liquidation) v Wah Nam Plastic Industry* [1999] 2 SLR 381). As LP Thean JA said in the case referred to in the beginning of this paragraph at p 18:

> But, in our opinion, such default or inaction alone was not contumelious conduct. While it is true that no explanation has been given as to why no action was taken to ask the court to restore the present action for hearing, such absence of explanation per se does not give rise to an inference of intentional and contumelious conduct. Contumelious conduct, in our view, involves an element of scorn and intentional disregard of the rules of court or court order. 'Conduct is in the ordinary way only regarded as contumelious where there is a deliberate failure to comply with a specific order of the court', and 'a series of separate inordinate and inexcusable delays in complete disregard of the rules of court and with full awareness of the consequences can also properly, be regarded as contumelious conduct' (per Parker LJ in *Culbert v Stephen G Westwell & Co* [1993] 1 PIQR 54).

(b) Where there is such an inordinate and inexcusable delay that the defendant has been prejudiced by it

[8] In commenting on the words 'inordinate and inexcusable delay', the *Singapore Court Practice 2003* says at p 803:

> The words 'inordinate and inexcusable delay' connote delay which is out of the ordinary; that is, beyond the usual periods of delay experienced or which can be reasonably expected in the course of litigation, and which is not excused by the particular circumstances of the case.

[9] Under this head, there must first be an inordinate and inexcusable delay. It is only then that the question of a substantial risk of a fair trial or prejudice to the defendant will arise for consideration. It must be observed that even if the delay has been long and inexcusable it does not per se amount to prejudice (see *Department of Transport v Chris Smaller (Transport)* [1989] 1 All ER 897; *Eagil Trust v Pigott-Brown* [1985] 3 All ER 119). It is implicit under this head that the defendant must establish the prejudice that had been caused to him by the delay. Whether or not the defendant has been prejudiced by the delay is a question of fact to be decided by the court. The judgment of the Supreme Court in *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73 reveals that there must be particulars of the prejudice suffered by the defendant. Thus, there must be clear affidavit evidence concerning the alleged prejudice or the impossibility of a fair trial (see *Ling Kee Ling v Leow Leng Siong* [1992] 2 SLR 725). As long delay on its own does not amount to prejudice what is more significant is the evidence of prejudice adduced by the defendant. In commenting on the nature of the evidence required from both parties in an application to dismiss an action for want of prosecution, *The Supreme Court Practice 1979* says at p 432:

> On an application to dismiss for want of prosecution, except in a very clear case, it is desirable that the plaintiff should file evidence explaining all the circumstances relied on as excusing the delay, and exhibiting all relevant documents, and equally that the defendant should file evidence to establish the nature and extent of the prejudice occasioned to him by such delay.

[10] In *Ling Kee Ling v Leow Leng Siong* [1992] 2 SLR 725, the failure of the defendant to file an affidavit showing how a delay of five months had caused him prejudice was held to be fatal to his application. It must be

observed that any prejudice suffered by the defendant may be adversely affected by his conduct. In this regard, a distinction must be made between a situation in which the defendant passively waits for the plaintiff to take the next step in the proceeding — this inaction would not prejudice the defendant's application to dismiss; and the situation in which the defendant is in actual default himself and equally guilty of inordinate delay (see *Lee Mun Tuck v Tan Chin Kah & Anor* [1991] 2 MLJ 324). Thus, if a defendant has considerably contributed to the delay or, a fortiori, has actually agreed to it, he will seldom obtain the dismissal of the action (see *Austin Securities Ltd v Northgate and English Stores Ltd* [1969] 2 All ER 753; *Banco Popolare di Novara v John Livanos & Sons Ltd* [1973] 117 SJ 509). A similar result may also follow where the defendant is specifically ordered to take a procedural step and contributes to the delay by failing to do so. In *United Malayan Banking Corp Bhd v Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 MLJ 73, the court took into account the defendants' failure to file their list of documents in accordance with the order of the SARin dismissing their application to strike out. However, the conduct of a defendant is not an absolute bar to the obtaining of an order of dismissal. As Lord Browne-Wilkinson said in *Roebuck v Mungovin* [1994] 1 All ER 568 at p 575:

> Where a plaintiff has been guilty of inordinate and inexcusable delay which has prejudiced the defendant, subsequent conduct by the defendant which induces the plaintiff to incur further expense in pursuing the action does not, in law, constitute an absolute bar preventing the defendant from obtaining a striking out order. Such conduct of the defendant is, of course, a relevant factor to be taken into account by the judge in exercising his discretion whether or not to strike out the claim, the weight to be attached to such conduct depending upon all the circumstances of the particular case. At one extreme, there will be cases like the present where the defendant's actions are minor (as compared with the inordinate delay by the plaintiff) and cannot have lulled the plaintiff into any major additional expenditure; in such a case a judge exercising his discretion will be likely to attach only slight weight to the defendant's actions. At the other extreme one can conceive of a case where, the plaintiff having been guilty of inordinate delay, the defendant has for years thereafter continued with the action thereby leading the plaintiff to incur substantial legal costs; in such a case the judge may attach considerable weight to the defendant's activities. But it is for the judge in each case in exercising his discretion to decide what weight to attach in all the circumstances of the case to the defendant's actions and I trust that in the future there will be few occasions on which the Court of Appeal will be invited to review his decision on the point.

[11] In arriving at our decision, we considered the following matters based on the judgment of the learned trial judge and the submissions advanced by both parties.

THE PERIOD OF DELAY

[12] As mentioned earlier the writ is dated 13 October 1986 and the defence was filed on 18 March 1987. The appellant filed the first summons on 6 May 1996. The learned trial judge calculated the delay from 18 March 1987 when the pleadings were deemed to have closed and said that there was a delay of nine years in filing the first summons. Learned counsel for

the respondents also contended that the delay commenced in 1987. In his reply, learned counsel for the appellant said that up to 10 January 1991 the proceeding was the subject matter of an O 14 application. This was not challenged by the respondents. A proceeding which is litigated under O 14 of the RHC cannot at the same time be prepared for trial. Thus, O 25 r 2(a) of the RHC provides that the rule does not apply to actions in which the defendant or the plaintiff has applied for judgment under O 14. Where an application for summary judgment is dismissed the period for applying for a summons for directions would run one month from the date of such dismissal (see *Hongkong Bank (M) Bhd v Tan Tock Sing & Ors* [1998] 6 MLJ 89). The delay in this case would therefore be one month from 10 January 1991 after the O 14 application came to an end to 6 May 1996 when the first summons was filed. That amounts to a delay of five years and three months. The learned trial judge had therefore misdirected himself on the period of delay.

CLASSIFICATION OF THE DELAY

[13] A determination as to whether the delay is intentional and contumelious or inordinate and inexcusable is significant. If it is the latter the burden is on the defendant to establish that he has suffered or will suffer prejudice as a result of the delay. If it is the former there is no burden on the defendant to establish prejudice; but he must show that the delay was intentional and contumelious.

[14] There can be no dispute that the appellant did not take any step in the action from 1991 to 1996. No reasons were also advanced to explain the inaction during that period. It is settled law that delay per se does not make the conduct intentional and contumelious or an abuse of the process of the court. The absence of an explanation for the delay per se also does not give rise to an inference of intentional and contumelious conduct. There must be something more as explained in the passage from the judgment in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [2001] 4 SLR 1, the relevant part of which we have reproduced earlier. The only reference to such conduct appears in para 22 of the first respondent's affidavit in support of the application. It reads as follows:

> Keingkaran Plaintif untuk mendakwa tindakan ini adalah sengaja 'contumelious' dan menyalah-gunakan proses Mahkamah.

[15] This is a bald statement without condescending to any particulars. In the circumstances, there is no evidence on record to show that the conduct of the appellant is intentional and contumelious or an abuse of process of the court. The case thus falls under the second rule.

THE DELAY AND THE PREJUDICE

[16] It is settled law that the delay under the second rule must be so inordinate and inexcusable that the respondents have been prejudiced by it. The period of five years and three months during which no action was taken by the appellant in the action clearly connotes delay which is out of the ordinary. The burden is on the appellant to explain the reasons for the

delay. The appellant has not done so with regard to the period prior to the issue of the first summons. In the absence of any explanation, it must be taken that the delay is inordinate and inexcusable. However, that alone is not sufficient. There must be evidence of prejudice suffered by the respondents. As we said earlier, the burden is on them to establish the prejudice. In this regard, para 23 of the first respondent's affidavit in support of the application reads as follows:

> Kelewatan Plaintif dalam mendakwa tindakan ini telah memprejudiskan Defendan-Defendan Pertama dan Kedua secara serius dan juga untuk mengadakan satu perbicaraan yang adil.

[17] Again this is a bald statement without any particularisation of the nature and extent of the prejudice suffered. The respondents have therefore failed to show that the delay caused by the appellant in proceeding with the action had prejudiced them. This alone is sufficient for their application to have been dismissed.

[18] Be that as it may, it was the finding of the learned trial judge that the respondents had been prejudiced in that they were under the impression that the settlement agreement had terminated all proceedings against them. If the respondents genuinely believed that this action formed part of the settlement agreement they ought to have filed an application to dismiss the action on that ground. This was not done. Instead they attended at the hearing of the summons for directions from time to time and the only objection raised was that the action had been settled without any reference to the delay that had been caused. It is superfluous to state that delay is the very foundation of an application to dismiss a proceeding for want of prosecution. The absence of objection to the delay by the respondents transcends the boundaries of them passively waiting for the appellant to take the next step in the proceeding. This can only mean that they were not affected by the delay. Any prejudice suffered by them as a result of their impression that the action had been terminated is of their own making and which is something for them to resolve. They had therefore conducted themselves in such a manner as to induce the appellant to reasonably belief that the action would proceed to trial notwithstanding the delay. It is our view that considerable weight should be attached to the conduct of the respondents on the facts of this case in assessing the significance of the delay. This aspect of the case was not considered by the learned trial judge in arriving at his decision.

[19] The dismissal of this action for want of prosecution in the absence of prejudice to the respondent is one that is vitiated by misdirection and it is for this court to exercise its discretion afresh in line with the principle enunciated in *Costellow v Somerset County Council* [1993] 1 All ER 952.

THE PROCEDURE ADOPTED BY THE RESPONDENTS

[20] The stage at which a defendant may file an application to strike out an action for want of prosecution is provided by O 25 r 4 of the RHC which reads as follows:

> If the plaintiff does not take out a summons for directions in accordance with the foregoing provisions of this rule, the defendant or any defendant may do so or apply for an order to dismiss the action.

[21] This rule provides that a defendant becomes entitled to file the application to dismiss the proceeding when the plaintiff has failed to take out a summons for directions within the specified period. The rule must not and cannot be interpreted to mean that a plaintiff loses the right to apply for a summons for directions after the expiry of the stipulated one-month period from the close of pleadings. Where, however, the plaintiff makes the application after the expiry of the time period he must of course seek an extension of time to do so as provided by O 3 r 5 of the RHC. In this regard it must be observed that the court has the power to grant a plaintiff any necessary extension whether a separate application for it is made or not (see *Costellow v Somerset County Council* [1993] 1 All ER 952).

[22] It will be observed that the respondents filed the application to strike out the action for want of prosecution after the appellant had filed the second summons. At that point of time, there was subsisting a valid summons for directions. The course adopted by the respondents in such circumstance is therefore irregular. As a matter of fact, para 11 of the appellant's affidavit filed in opposition to the respondents' affidavit in support of their application avers that the respondents had been directed by the learned senior assistant registrar to file an application to enable the court to decide whether the settlement agreement includes the action. This is a proper direction as the question of whether the action has been settled can be appropriately dealt with only in such an application and not in a summons for directions. As is obvious by now, the respondents did not follow the direction of the court and instead filed an application to dismiss the action for want of prosecution. Quite contrary to the assertion of the respondents it is, therefore, they who are guilty of an abuse of the process of the court. In any event, as the hearing of the appellant's second summons would involve an extension of time the learned trial judge ought to have heard both the applications together. In this regard, we refer to *Costellow v Somerset County Council* [1993] 1 All ER 952 where Sir Thomas Bingham MR said at pp 959–960:

> Where, as here, the defendant seeks to dismiss and the plaintiff seeks an extension of time, there can be no general rule that the plaintiff's application should be heard first, with dismissal of his action as an inevitable consequence if he fails to show a good reason for his procedural default. In the great mass of cases, it is appropriate for the court to hear both summonses together, since in considering what justice requires, the court is concerned to do justice to both parties, the plaintiff as well as the defendant, and the case is best viewed in the round. In the present case, there was before the district judge no application by the plaintiff for extension, although there was before the judge. It is in my view of little or no significance whether the plaintiff makes such an application or not: if he does not, the court considering the defendant's application to dismiss will inevitably consider the plaintiff's position and, if the court refuses to dismiss, it has power to grant the plaintiff any necessary extension whether separate application is made or not.

[23] The learned trial judge had therefore erred in hearing only the application of the respondents with total disregard of the pending second summons.

[24] As stated earlier, the learned trial judge had completely misdirected himself in arriving at his decision thereby warranting interference by this court. In the upshot, we allowed the appeal with costs and ordered that the deposit paid be refunded to the appellant.

Appeal allowed.

Reported by Sally Kee Seok Meng